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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 5.

HARTFORD-EMPIRE COMPANY, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR HAZEL-ATLAS DEFENDANTS, ON RE-ARGUMENT.

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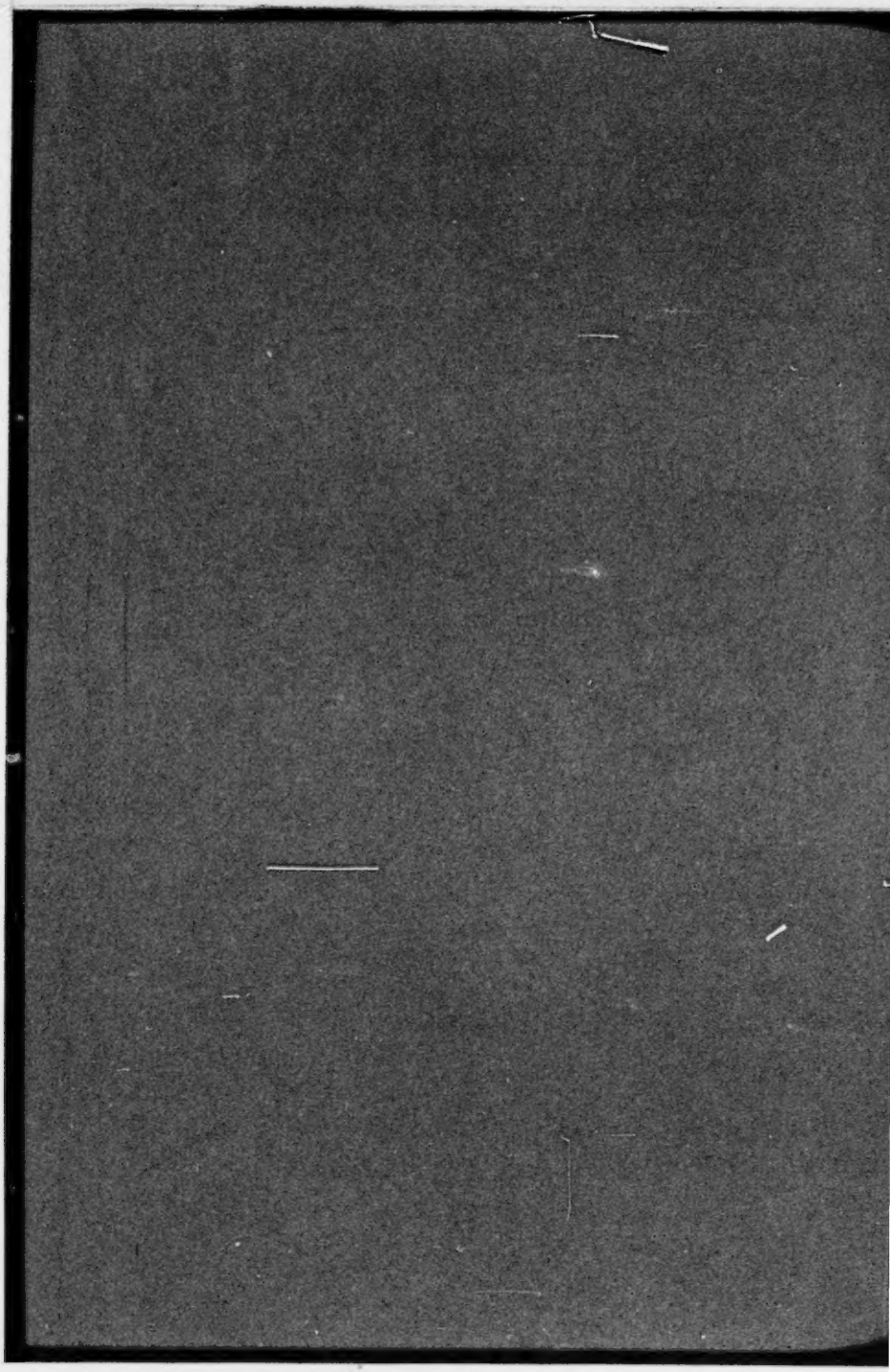
Attorneys for Hazel-Atlas Defendants.

OCTOBER, 1944.



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This reply brief is confined to paragraph 46 of the judgment,* entered October 8, 1942, and is presented because the government's position, as expressed in its brief on reargument, concerning that paragraph, imposes a special and heavy money penalty on Hazel, for the benefit of Hartford.

On May 9, 1941, the trial court found that the Hartford-Hazel contract of July 1, 1932 and the payments to be made thereunder by Hartford and by Hazel were *prima facie* illegal (impounding order conclusions, 1 R. 518), and then ordered Hartford and Hazel to continue making the payments to the court and not to each other. The judgment of October 8, 1942 declared the contract unlawful, cancelled it, and continued the impounding order "until further order of this Court", etc. (para. 46).

* This matter is also discussed in the Hazel main brief, p. 52 *et seq.;* gov't brief, p. 409 *et seq.;* Hazel reply brief, p. 26 *et seq.;* and on reargument, Joint Brief, p. 171 *et seq.;* and gov't brief, p. 192 *et seq.*

The reason given by the trial court for ordering the payments to be made to it as they became due under the contract was to "insure a sufficient fund for the dissolution of Hartford and the establishment of competing concerns if that ultimately becomes necessary" (impounding order conclusion, 1 R. 518). However, the unsoundness of this reason has been pointed out (Joint Brief, pp. 173, 174; Hazel main brief, p. 52), and it apparently has been abandoned by the government which does not now seem to be arguing for the dissolution of Hartford.

The present position of the government (brief, p. 194) is that the payments should be divided into two parts, one being for a first period, from May 9, 1941 to September 1, 1942, and the other part being for a second period, from this last date to the present time.

For the first period, the government proposes that the payments ordered from Hartford are not to be paid to Hazel, but are to be returned to Hartford or its licensees, and that the Hazel payments for Hartford patents, which the court ordered Hazel to make, "should be turned over to Hartford" (gov't brief, p. 195). In other words, the contract is to be enforced against Hazel in favor of Hartford, while Hazel is to be deprived of its rights under the contract.

For the second period, the government proposes that Hartford also be relieved from the contract, and also Hazel, whose payments are to be "returned to Hazel on the same terms as those on which the ear-marked funds are returned to the other licensees", namely, subject to certain credits for Hartford services (judgment, para. 15; gov't brief on reargument, p. 47, *et seq.*). We submit that if the moneys due from Hartford and Hazel are not to be distributed as provided in the contract, then all Hazel's pay-

ments into court should be returned to Hazel—there is no sound distinction between the two sets of payments by Hazel into court, if the contract be considered illegal.

The vice in the proposal by the government with respect to the first period is that it confiscates Hazel's money by enforcing against it the obligations of a contract while at the same time depriving Hazel of its benefits, the grounds for such enforcement being the illegality of the contract. Thereby, a money punishment, or fine, is imposed upon Hazel in an equity suit brought under Section 4 of the Sherman Act "to prevent and restrain violations" of the Act. Only in criminal suits under Section 1 should fines or punishments be imposed. And those injured by anti-trust violations have remedy by suits at law for money damages, Sherman Act, Sec. 7, 15 U. S. C. A., Sec. 15.

The Government offers as a reason for such discrimination that "Hazel should be put in the same position as the other licensees in this respect" (brief, p. 194). By this is meant that as the other licensees paid their royalties to Hartford for the period from May 9, 1941 to September 1, 1942, Hazel should also. But this wholly ignores the fact that Hazel was compelled by the court's order to pay its money for Hartford patents, for using Hazel's own machines, in performance of the contract while at the same time it was deprived of performance of the contract by Hartford (payment for Hazel's patents, engineering knowledge, etc.). Not only was no other licensee compelled by the court during such period to perform its contract with Hartford, but also the contracts of other licensees were performed by Hartford (the furnishing of machines designed, owned and serviced by Hartford). Although Hazel paid precisely the same royalty as other licensees who had no investment in equipment or research, it used and serviced, at great ex-

Hartford is not entitled to more favorable treatment than Hazel with respect to the contract—which should not be enforced against only Hazel (not Hartford) for the first set of payments. These should be disposed of in the same manner as suggested by the government with respect to Hazel's subsequent payments, because all payments were compulsory, and are governed by the same principles of law and equity.

The government brief (p. 195) says "To the extent that Hazel has contributed engineering services and technical advice to Hartford, Hazel should be compensated from the funds impounded on a *quantum meruit* basis." We agree that if the contract is illegal, Hazel can not enforce it against Hartford and should rely upon *quantum meruit*. But the same rule should be applied to Hartford, and the contract should not be enforced to benefit it, by making Hazel pay for Hartford patents, for the period between May 9, 1941, and September 1, 1942.

Conclusion.

Paragraph 46 of the judgment should be deleted, and all payments compelled from Hazel by the court under the impounding order of May 9, 1941 (not only payments made after September 1, 1944) should be returned to Hazel on the same terms as the ear-marked funds are disposed of, leaving Hazel to its *quantum meruit*. Of course, if the Hartford-Hazel contract is lawful, payments should be made in accordance therewith.

Respectfully submitted,

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October, 1944.